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11 IN THE UNITED STATES DISTRICT COURT
12 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

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UNITED STATES OF AMERICA,) CR03-40210 SBA
Plaintiff,)
vs.)
MOHAMMED YOUSEF CHAUDHRY)
AND)
ALI H. KAHN)
Defendants.)

REPLY TO GOVERNMENT'S
RESPONSE TO DEFENDANT'S
MOTION FOR RECONSIDERATION
OF MOTION TO SEVER
Date: September 11, 2007
Time: 3:00 p.m.
The Honorable Judge Saundra Brown
Armstrong

I.

SEVERANCE OF THE DEFENDANTS' TRIALS IS PROPER, BECAUSE MOST OF
THE EVIDENCE PERTAINS SOLELY TO THE CO-DEFENDANT AND WILL
PREJUDICE MR. KAHN'S TRIAL

Severance under Rule 14 of the Federal Rules of Criminal Procedure is proper if the defendant's case is prejudiced by the existing joinder. Mr. Kahn's case will be severely prejudiced if the court requires him to go to trial with his co-defendant. The government
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MOTION TO SEVER

1 claims that the defendant only presents one new fact for the court to consider in determining
2 whether to grant defendant's motion to sever, which is the fact that the government intends to
3 introduce 404(b) evidence at trial. The fact that the government intends to introduce this
4 404(b) evidence against the co-defendant, in addition to the other issues previously raised in
5 Mr. Kahn's Motion to Sever, show that a joint trial will prejudice Mr. Kahn.

7 The government claims that the 404(b) evidence relates to a scheme perpetrated by
8 both defendants. In fact, there is no evidence to show that Mr. Kahn had any knowledge of
9 his co-defendant's alleged scheme to evade his taxes. The government seeks to introduce at
10 trial a variety 404(b) evidence, none of which shows that Mr. Kahn participated or assisted in
11 such an alleged scheme or even that he had any knowledge of such a scheme by his co-
12 defendant. Included in the evidence the government intends to introduce at trial are: real and
13 documentary evidence showing that Mr. Chaudhry failed to report income in tax years other
14 than those charged in the indictment, along with the amounts he failed to report; witness
15 testimony, such as testimony of IRS Agent Janet Appleton regarding the audit of Mr.
16 Chaudhry's tax deficiencies; and real and documentary evidence of Mr. Chaudhry's alleged
17 trade in gray market software. These are merely examples of thousands of pages of 404(b)
18 evidence that does not in any way relate to whether Mr. Kahn either conspired to or did in
19 fact structure financial transactions for the purpose of evading reporting requirements
20 pursuant to 31 U.S.C. section 5313, et seq. It is important to remind the court that the
21 defendant is not charged with participating in acts of nor conspiring to subscribe to false tax
22 returns by Chaudhry. In fact, there is no evidence that Mr. Khan had any knowledge
23

1 whatsoever of any scheme by Mr. Chaudhry to evade his taxes. This type of evidence, if
2 admitted at a joint trial, serves only to prejudice Mr. Kahn by causing the jury to believe that
3 Mr. Kahn was involved in a scheme with Mr. Chaudhry to subscribe to false tax returns when
4 in fact Mr. Kahn was unaware of Mr. Chaudhry's motives (if any did exist).
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6 Additionally, the 404(b) evidence the government seeks to introduce is not probative
7 of a conspiracy between Mr. Kahn and his co-defendant. Under Federal Rule of Evidence
8 403, the exclusion of this evidence is proper when its "probative value is substantially
9 outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury . . ."
10 If the court does not exclude the admission of this evidence, the court must sever the trials of
11 Mr. Kahn and his co-defendant.
12

13 It is not only the 404(b) evidence that will cause Mr. Kahn's case to be prejudiced, but
14 also the vast majority of all other evidence the government intends to introduce at trial. In
15 addition to the 404(b) evidence that is completely unrelated to Mr. Kahn which the
16 government seeks to admit at trial, the government also intends to introduce many witnesses
17 and thousands of pages of other evidence that relate only to Mr. Kahn's co-defendant.
18 Within the past month, the government has produced approximately 6,000 pages of
19 additional discovery, and more material is yet to come. A minuscule amount of this
20 discovery relates to Mr. Kahn. The government disclosed that it intends to call more than
21 fifty witnesses at trial. Almost all of the witnesses listed will testify only to matters
22 concerning the co-defendant and his statements and conduct. Moreover, the 112 items on the
23 government's exhibit list pertain almost exclusively to the co-defendant and the co-
24

defendant's conduct.

The defendants' trials should be severed because Mr. Kahn will be prejudiced by both the sheer volume as well as the many types of evidence that concern only his co-defendant. Furthermore, severance is also required due to the anticipated introduction of evidence relating only to the separate charges against Defendant Chaudhry which is otherwise extraneous and irrelevant and in no way concern Defendant Khan and the charges for which he is on trial.

II.

AS AN ALTERNATE TO SEVERING THE DEFENDANTS' TRIALS, USING DUAL JURIES MAY PREVENT PREJUDICE TO MR. KAHN FROM A JOINT TRIAL

Mr. Kahn is likely to be greatly prejudiced if the trials of the defendants are not severed. However, one alternate to a severance which will prevent prejudice to Mr. Khan is the use of dual juries.

The determination of whether or not defendants' cases should be joined is whether the evidence is "easily compartmentalized." *Lambright v. Stewart*, 191 F. 3d 1181, 1186 (9th Cir. 1999) quoting *United States v. Vasquez-Velasco*, 15 F. 3d 833, 846 (9th Cir. 1994). If the Court does not sever Mr. Kahn's case from his co-defendant's case, the jury will have difficulty not assuming that Mr. Kahn is guilty simply by his association with Mr. Chaudhry and Chaudhry's business. The government plans to introduce vast amounts of evidence of Mr. Chaudhry's past crimes and evidence totally unrelated to Ali Khan. Much of the evidence introduced against Mr. Chaudhry will pertain to his activities before he employed

1 Mr. Kahn or will pertain to activities that Mr. Khan had no part in or any knowledge of. The
2 jury should consider none of this evidence when determining the guilt or innocence of Mr.
3 Kahn. It will be difficult for a jury to determine which parts of the evidence against Mr.
4 Chaudhry can also be considered in relation to Mr. Kahn. To prevent the jury from possibly
5 considering this evidence, the Court may utilize dual juries, if it determines that severance of
6 Mr. Kahn's trial is impracticable. Dual juries have been found to "palliate, rather than
7 exacerbate, the risks of a joint trial." *Id.* Using dual juries "keep[s] dangerous evidence
8 away from the ears of the jurors for the defendant to whom it does not apply." *Id.*

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10 As the court can see from the government's revised witness and exhibit lists, as well
11 as the additional motions and other materials that have since been filed in this matter, the
12 bulk of the evidence in this case clearly relates to Mr. Chaudhry and not Mr. Kahn. For the
13 foregoing reasons, Defendant Kahn respectfully requests the Court grant his motion to sever
14 the trials of the defendants. In the alternative, if the Court does not grant defendant's motion
15 to sever, the defendant respectfully submits that the use of dual juries is appropriate in this
16 case.

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19 **Dated: September 2, 2007**

Respectfully submitted,

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22 SETH P. CHAZIN
23 Attorney for ALI KHAN
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